Filed 5/28/19 P. v. Erickson CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. STEVEN LAURENCE ERICKSON, Defendant and Appellant.	C086023 (Super. Ct. No. 16FE003051)

A jury found defendant Steven Laurence Erickson guilty of numerous counts of sexual abuse. On appeal, defendant challenges the admission of evidence of uncharged sexual misconduct committed against his older son. He also contends the prosecutor, in closing arguments, improperly discussed supposed leniency defendant had received in not being charged with more counts. Finally, he maintains those errors cumulatively require reversal. We will affirm.

BACKGROUND

The victim testified that defendant, his stepfather, had sexually abused him from the age of 13 to almost 17.

Defendant's sexual contact with the victim began when defendant introduced him to a penis extension device and related videos. Defendant took a nude photo of the victim, purportedly for a before-and-after comparison. He also measured the victim's erect penis with a ruler and a tape measure. Not long after that, defendant gave the victim alcohol and masturbated him in a hotel room.

In December of 2011, when he was 13, the victim's mother moved out. A few weeks after that, defendant bought the victim a cell phone, and that same day, made the victim perform oral sex on him. For a year and a half, defendant made the victim orally copulate him every other day. One time, the victim's younger brother was lying in the bed when the victim was orally copulating defendant, and the brother woke up. The brother asked, "What are you guys doing?" Later, defendant asked the victim to tell the brother he did not really see what he saw.

Defendant would also orally copulate the victim with the same frequency. The victim testified it happened "[t]oo many [times] to count."

Three or four months after the victim's mother moved out, defendant began sodomizing the victim. The victim testified he was sodomized before his 14th birthday, and the sodomy continued, occurring every two or three days.

Once when defendant was sodomizing the victim, defendant's son walked in the room. Defendant said something to the effect of, "We're just going to bed," or "watching TV," and the son said, "Oh, my God, whatever," in an irritated way and walked out.

Defendant had the victim sodomize him approximately 10 to 15 times.

The sexual contact stopped approximately one month before the victim moved out of defendant's house in April of 2015—the month before he turned 17. From fall 2011 to when he moved out, the longest gap during which no sexual contact occurred was one week at the most.

Jury verdict and sentencing

The jury found defendant guilty of 14 counts of lewd or lascivious acts on a child under 14 (Pen. Code, § 288, subd. (a)) and five counts of oral copulation (Pen. Code, former § 288a, subd. (b)(2)). The oral copulation counts were ultimately dismissed as improperly charged.

The trial court imposed a 34-year aggregate term, consisting of the eight-year upper term for the principal count and consecutive two-year terms (one-third the midterm) for the 13 remaining counts.

DISCUSSION

I

Evidence of Uncharged Misconduct

Defendant first contends the trial court erred in admitting evidence of uncharged sexual misconduct committed against his older son.

A. *Background*

The People moved in limine to admit, under Evidence Code sections 1108 and 1101,[1] testimony of defendant's son. The written motion stated that the son had admitted being molested by defendant in a recorded jail call. When the son was later questioned about the molestation, he offered neither an admission nor a denial. The motion referred to "ample evidence" defendant possessed child pornography involving his son. The motion also stated that if the son denied the molestation, the prosecution would seek to impeach him with his jail calls and statements.

The trial court admitted evidence of the son's molestation.[2] It found the probative value outweighed the prejudice to defendant and the potential for juror confusion. It

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[1] Undesignated statutory references are to the Evidence Code.

[2] The trial court also admitted evidence of nude photos of the son. Defendant does not challenge the trial court's decision to admit the photos.

added, "I don't think it's going to consume an undue amount of time." Further, "the uncharged offenses are not any more inflammatory than the charged offenses. To the contrary, they're similar enough so that admitting it will not be prejudicial on those grounds." The section 1108 evidence "is extremely probative of the Defendant's propensity to commit the charged offense . . . and is not unduly remote."

Defendant's son thereafter testified that he was very close to defendant. He admitted sleeping in the same bed with defendant but denied any sexual acts occurred. During the son's testimony, the jury was played a jail call recording, wherein the son said, "I was molested when I was 13 years old till when I was 15." He did not say who molested him, but said, "I'll tell you later. I'm not lying though. . . . I would never lie about that." When asked if it was defendant, he said "no."

Hearing the recording, the son testified, "That's a drug addict right there, coming down, hoping he doesn't go to jail and not have a place to live." Saying he was molested was an attempt to get his caller to stay and get him out of jail.

In another recording, the son said: "Tell him that, uh, what happened with my dad. [¶] . . . [¶] I need you to call Heather and tell her that it actually happened to me too." The son again testified that he was a drug addict trying to get out of jail. Several other recordings were also played and several photos were shown to the jury.

B. *Analysis*

On appeal, defendant contends the evidence regarding his son should have been excluded under section 352. He argues unadjudicated allegations are based on weaker and more uncertain evidence—which weighs against admissibility—and his situation was more acute as his son denied the molestation. Defendant avers the evidence was vague at best, and remote in that it occurred more than 20 years before trial. He also argues that it created an emotionally charged mini-trial that stretched over two days that was very likely to provoke an emotional response. He further avers that the trial court's analysis

did not address the weak evidence and lack of specifics as to what happened to the son. We find no error.

Where a defendant is accused of a sexual offense, section 1108 permits evidence of other sexual offenses so long as it is not inadmissible under section 352. (§ 1108; *People v. Cordova* (2015) 62 Cal.4th 104, 132.) As such, the probative value of the evidence cannot be "substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.)

In considering prejudice, "trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

We review a challenge to the admission of evidence under section 1108 for abuse of discretion. (*People v. Cordova, supra*, 62 Cal.4th at p. 132.) A trial court abuses its discretion when its ruling "falls outside the bounds of reason." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.)

Here, the trial court acted well within its discretion in admitting evidence of the son's molestation. The evidence was highly probative in that it involved similar conduct with a similarly aged male victim who also lived with defendant. Although that similarity made it undoubtedly damaging to the defense, it was not unduly prejudicial under section 352. (See *People v. Powell* (2018) 6 Cal.5th 136, 162-163 [prejudice under section 352 refers to evidence that inflames the jury's emotions and motivates them to

reward or punish based on emotional reaction, not prejudice or damage naturally flowing from relevant, highly probative evidence].)

Further, given its high probative value, it was not unduly remote despite occurring over 20 years ago. (See *People v. Branch* (2001) 91 Cal.App.4th 274, 284 [evidence of a sex offense committed 30 years earlier was properly admitted].) As noted, there are significant similarities between the prior and the charged offenses, which serves to "balance[] out the remoteness." (*People v. Waples* (2000) 79 Cal.App.4th 1389, 1395.) And while the son denied the molestation in court, the allegations were supported by recordings and photographs. Hence, the evidence cannot be considered weak.

Finally, when the trial court ruled the evidence admissible, there was nothing to indicate the testimony would consume an undue amount of time. And even though the testimony ultimately lasted part of two days, given its probative nature, that was not an excessive amount of time.

As such, we find the trial court acted within its discretion in admitting the evidence.

II

Improper Closing Arguments

Defendant next contends the prosecutor, in closing arguments, improperly discussed supposed leniency defendant had received in not being charged with more counts. He maintains the argument was based on evidence not presented at trial and that it implicitly urged the jury not to give defendant the benefit of the doubt because the prosecutor had already done so in her charging decisions. We disagree.

A. *Background*

During closing arguments the prosecutor argued to the jury:

"[I]t happened all the time. His estimate, if we are conservative, is two times per week. That's what he said, until he was 17 years old, just before his 17th birthday.

"When you have events like this where it is prolonged sexual abuse, the number of charges we could have is infinite. We're not going to bring a jury in here and go through a hundred charges. That's not practical and it's not a good use of resources. So the way we do it is we give the benefit of the doubt to the defendant. Does he deserve it? No, but that's what he gets. He gets the benefit of the doubt with the charges.

"There's 22 charges, even though if we were to do the math on two times per week of oral copulation on [the victim], four times per week where [the victim] said he had to suck the defendant's penis . . . if we were to do the math and then add in anal penetration, then all the showering incidents, everything that happened, then it's too many charges to go through. So he gets the benefit of the doubt, and we take the minimum charges to show that it happened regularly, and that's how you'll see the majority of the charges proved where [the victim] cannot distinguish something specifically."

Then, in rebuttal, the prosecutor said: "[Defendant] should be held accountable for every single time he touched him. Unfortunately, we don't get to do that. We only take what we can do. We have 20 charges here."

B. *Analysis*

As defendant acknowledges, his trial counsel failed to object to the arguments now challenged on appeal. That forfeits the challenge. (See *People v. Wrest* (1992) 3 Cal.4th 1088, 1105 ["by failing to interpose any objection at trial, defendant waived any error or misconduct emanating from the prosecutor's argument that could have been cured by a timely admonition"].) But on defendant's request, we will address the challenge as a claim of ineffective assistance of counsel. Thus to prevail, defendant must establish (1) that his trial counsel's performance "fell below an objective standard of reasonableness . . . under prevailing professional norms," and (2) that he was prejudiced by the deficient performance. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687-

688, 691-692 [80 L.Ed.2d 674, 693-694, 696].) Here, defendant can establish neither element.

"A prosecutor may make fair comment on the state of the evidence." (*People v. Cook* (2006) 39 Cal.4th 566, 608; see also *People v. Lewis* (2009) 46 Cal.4th 1255, 1304.) A prosecutor also has "wide latitude to discuss and draw inferences from the evidence at trial." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

Here, the record showed that defendant had sexually abused the victim a substantial number of times. The victim testified to orally copulating defendant every other day for a year and a half. And defendant orally copulated him "[t]oo many [times] to count." Defendant would sodomize him every two to three days. And defendant had the victim sodomize him approximately 10 to 15 times.

On this record, we cannot conclude counsel was remiss in failing to object. The jury might reasonably question why defendant had only been charged with 22 acts of sexual abuse when the victim had testified about dozens, even hundreds, more acts. It was reasonable for the prosecutor to comment on that disparity by explaining that not all acts were charged. The prosecutor in no way implied defendant should not receive the benefit of the doubt—or that a lesser burden of proof should apply. Because no prosecutorial misconduct occurred, counsel had no cause to object, and the claim of ineffective assistance fails.

III

Cumulative Error

Defendant finally contends the cumulative effect of the above-described errors warrants reversal. He argues both errors were likely to distract jurors from the task of applying the evidence to the elements of the charged crimes. Having found no merit in defendant's two charges of error, we reject the contention of cumulative error as well.

DISPOSITION

The judgment is affirmed.

KRAUSE, J.

We concur:

MAURO, Acting P. J.

MURRAY, J.